APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED SEPTEMBER 16, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 09-41075
SUMMARY CALENDAR

JOHN DOE, Father of Minor Daughter H.S.; JANE DOE, Mother of Minor Daughter H.S.; H. S., Minor Daughter of John and Jane Doe,

Plaintiffs - Appellants

v.

SILSBEE INDEPENDENT SCHOOL DISTRICT; RICHARD BAIN, JR., Superintendent; GAYE LOKEY, Principal; SISSY MCINNIS; RAKHEEM BOLTON; DAVID SHEFFIELD,

Defendants - Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

NO. 1:09-CV-374

Before GARZA, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*:

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

Appendix A

Parents John and Jane Doe, and their minor daughter, H.S. (collectively, "Appellants"), appeal the district court's FED. R. CIV. P. 12(b)(6) dismissal of their 42 U.S.C. § 1983 claims against District Attorney David Sheffield ("Sheffield"), Silsbee Independent School District ("SISD"), Richard Bain, Jr., Gaye Lokey, Sissy McInnis (collectively, "Appellees"), and Rakheem Bolton.[1]

This claim arises from John and Jane Doe's allegation that their daughter, H.S., was sexually assaulted at a party by Bolton and Christian Rountree,[2] fellow students at H.S.'s high school. Appellants claim that after the arrest, Sheffield told them that despite having enough evidence to go to trial, the grand jury was racially divided and therefore would not vote to return an indictment against Rountree and Bolton, who were African-American. The grand jury ultimately voted against indicting Rountree and Bolton. Appellants claim that after the vote, they heard derogatory comments in the community about H.S. that indicated a detailed knowledge of the official investigation and grand jury proceedings.

As a cheerleader for SISD, H.S. was contractually required to cheer for the basketball team, whose roster included Bolton. At a February game, H.S. cheered for the team but refused to cheer for Bolton individually. As a result, Bain and Lokey told H.S. that she had either to cheer when the others cheered or to go home. H.S. chose

1. Pursuant to supplemental state law claims, Bolton is a party to this appeal. He has not filed any briefing on appeal.

2. Rountree is no longer a party to this appeal.

to leave, and McInnis subsequently removed her from the squad for the rest of the year. H.S. was permitted to try out for the squad again the following year.

Appellants originally filed a complaint under 42 U.S.C. § 1983. Appellees filed FED R. CIV. P. 12(b)(6) motions for failure to state a claim. The district court denied Appellees' motions but requested that Appellants file an amended complaint that "clearly and concisely state[d] factual allegations that support[ed] the elements of the asserted causes of action." Appellants filed an amended complaint. Appellees again moved to dismiss for failure to state a claim. This time, the district court granted the motion to dismiss. This appeal followed.

We review de novo a Rule 12(b)(6) dismissal of a claim, "accepting all well pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *True v. Robles*, 571 F.3d 412, 417 (5th Cir. 2009) (internal quotation marks and citation omitted). FED R. CIV. P. 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." A Rule 12(b)(6) dismissal for failure to state a claim is appropriate when the plaintiff has not alleged enough facts to state a claim to relief that is plausible on its face, and when the plaintiff fails to plead facts "enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007).

Appendix A

To state a claim under § 1983, a plaintiff must allege that a state actor has violated "a right secured by the Constitution and laws of the United States." *West v. Atkins*, 487 U.S. 42, 48 (1988) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)). Appellants claim that Sheffield deprived H.S. of her right to freedom from bodily injury and stigmatization, which Appellants allege are protected liberty interests under the Fourteenth Amendment. Specifically, they argue that subsequent to the grand jury's decision not to indict Rountree and Bolton, Sheffield "defamed" H.S. in a press conference and illegally revealed details of the indictment hearing. Appellants are correct that "bodily integrity" constitutes a protected liberty interest under the Fourteenth Amendment. *See, e.g.*, *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450–51 (5th Cir. 1994) (holding that a student was deprived of a protected liberty interest when sexually assaulted by her teacher). However, psychological injury *alone* does not constitute a violation of bodily integrity as contemplated under the Fourteenth Amendment. *See Parham v. J.R.*, 442 U.S. 584 (1979) (involving physical confinement); *Ingraham v. Wright*, 430 U.S. 651 (1977) (involving corporal punishment); *Spacek v. Charles*, 928 S.W.2d 88 (Tex. App.—Houston 1996) (involving corporal punishment). Furthermore, freedom from false stigmatization does not constitute a protected liberty interest under the Fourteenth Amendment. Our case law "does not establish the proposition that reputation alone, apart from some more tangible interest such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Accordingly, Appellants

have not stated valid claims for violation of any liberty interests protected by the Fourteenth Amendment.

Appellants also contend that SISD, Bain, Lokey, and McInnis deprived H.S. of a property interest protected by the Fourteenth Amendment. Specifically, they claim that H.S. had a property interest in her position on the cheer squad, and Lokey and McInnis deprived H.S. of that interest when they removed her from the cheer squad. "[S]tudents do not possess a constitutionally protected interest in their participation in extracurricular activities." *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Tex. 2005). Moreover, according to the terms of H.S.'s cheerleading contract, her failure to cheer constituted valid grounds for her removal from the cheer squad. Accordingly, the district court was correct in dismissing Appellants' claim for unconstitutional deprivation of property.

Appellants further argue that SISD, Bain, Lokey, and McInnis violated H.S.'s right to equal protection. Specifically, they claim H.S. was treated differently "because she is a female." "It is well established that a showing of discriminatory intent or purpose is required to establish a valid equal protection claim." *U.S. v. Crew*, 916 F.2d 980, 984 (5th Cir. 1990) (citing *Washington v. Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)). Because Appellants make no showing that H.S.'s gender motivated any of Appellees' actions, their equal protection argument fails.

Appellants allege Sheffield deprived H.S. of her First Amendment right to freedom of speech by retaliating against her for filing sexual assault charges against Bolton and Rountree. However, Appellants make no showing that Sheffield's alleged retaliatory acts relate to H.S.'s accusations against Rountree and Bolton. Accordingly, the district court properly dismissed this claim on Sheffield's Rule 12(b)(6) motion.

Finally, Appellants claim SISD, Bain, Lokey, and McInnis violated H.S.'s right to free speech under the First Amendment because H.S.'s decision not to cheer constituted protected speech inasmuch as it was a symbolic expression of her disapproval of Bolton's and Rountree's behavior. Courts have long held that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, 511 (1969). In order to determine whether conduct "possesses sufficient communicative elements to bring the First Amendment into play, [we] must ask whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Canady v. Bossier Parish School Board*, 240 F.3d 437, 440 (5th Cir. 2001) (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

Appellants contend the district court erred in holding that H.S. "did not convey the sort of particularized message that symbolic conduct must convey to be protected speech." Even assuming *arguendo* that H.S.'s speech was sufficiently particularized to warrant First

Amendment protection, student speech is not protected when that speech would "substantially interfere with the work of the school." *Tinker*, 393 U.S. at 509. "The question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether [it] requires a school affirmatively to promote particular speech." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988). In her capacity as cheerleader, H.S. served as a mouthpiece through which SISD could disseminate speech—namely, support for its athletic teams. Insofar as the First Amendment does not require schools to promote particular student speech, SISD had no duty to promote H.S.'s message by allowing her to cheer or not cheer, as she saw fit. Moreover, this act constituted substantial interference with the work of the school because, as a cheerleader, H.S. was at the basketball game for the purpose of cheering, a position she undertook voluntarily. Accordingly, we affirm the district court's dismissal of Appellants' First Amendment claim against SISD, Bain, Lokey, and McInnis.

Neither Appellants' complaint, nor any of their subsequent filings, assert constitutional violations against Sheffield, SISD, Bain, Lokey, or McInnis upon which Appellants could plausibly recover under 42 U.S.C. § 1983. Therefore, the district court did not err in dismissing Appellants' claims. Furthermore, the district court was within its discretion to decline to exercise supplemental jurisdiction over Appellants' state law claims against Bolton.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION, DATED OCTOBER 7, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

C. and C.S., for their minor daughter, H.S.,

Plaintiffs,

v.

SILSBEE INDEPENDENT SCHOOL DISTRICT, et al,

Defendants.

CIVIL ACTION NO. 1:09-CV-374-TH
JURY

ORDER

Before the Court are the *Defendant's Second Motion to Dismiss* [Clerk's Docket No. 32], filed by David Sheffield ("Sheffield") on August 3, 2009; *Defendants' Amended Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted* [Clerk's Docket No.34], filed by Silsbee ISD and Richard Bain, Jr. ("Bain"), on August 7, 2009; and *Defendants' Motion to Dismiss First Amended Complaint* [Clerk's Docket No. 36], filed by Gaye Lokey ("Lokey") and Sissy McInnis ("McInnis"), on August 7, 2009. Having considered the motions, pleadings, and all applicable law, the Court **GRANTS** these motions and enters this order and memorandum opinion in support.

Appendix B

I. INTRODUCTION

_____Plaintiffs, C. and C.S., are the parents of a minor daughter, H.S. They allege that their daughter was sexually assaulted by Defendants Bolton and Rountree, fellow students at her public high school, and that those defendants escaped punishment when a grand jury refused to indict them. They claim that District Attorney Sheffield should not have indicted the two boys before the mixed race grand jury, that he should have done a better job presenting the case to the grand jury by calling more witnesses, that he inappropriately discussed the case with others, and that he inappropriately held a press conference after the grand jury proceedings were completed. After the grand jury refused to return an indictment against them, the two boys (who had been put in separate facilities pending the indictment and upon H.S.' accusal) were allowed to return to school and school activities, including sports.

Later, when H.S., a cheerleader in the Silsbee public high school, refused to cheer for Bolton during varsity basketball games, she was removed from the cheerleading squad. She has since been reinstated. The Plaintiffs now sue the Defendants for violating H.S.'s "liberty" interests, her right to "symbolically protest," and her right to equal protection. The plaintiffs bring this suit under 42 U.S.C. §§ 1983 and 1988 and ask the Court to exercise supplemental jurisdiction over H.S.' sexual assault claims against Rountree and Bolton pursuant to 28 U.S.C. § 1367.

Appendix B

II. BACKGROUND

H.S., Rountree and Bolton were, at the time of the events in question, high school students at Silsbee High School in the Silsbee Independent School District ("SISD"). In October of 2008, all three minors attended a party where alcohol was present. In the early morning hours, police responded to a call that H.S. had been sexually assaulted. There were no witnesses to the alleged assault but the police report indicates that two boys discovered H.S. in a darkened room, crying, and saw "several" boys run down the street. Based on statements made to police by other attendees at the party, Rountree and Bolton were arrested the next day for sexually assaulting a minor. They were indicted by District Attorney Sheffield ("Sheffield") shortly after his January investiture. Following their arrest and pending their indictment, Rountree and Bolton were placed in a separate facility, pursuant to a protective order prohibiting them from being at school with H.S. They could not partake in school activities and were unable to continue on the school football team.

The Plaintiffs allege that after their arrest Rountree and Bolton's "supporters" circulated rumors about H.S. They perceived the Administrators of SISD as being insensitive to H.S. and "more sympathetic to her rapists." Pl. Amend. Compl. 22. The Plaintiffs claim that Sheffield told them that, despite the evidence, the "black grand jurors would not vote to return an indictment against Rountree and Bolton because of the race factor." At the indictment, Sheffield called H.S. to testify as well as the Silsbee Chief of Police. He did not call other parties who

had been present at the party to testify at the indictment. Pl. Amend. Compl. 23. The grand jury did not vote to indict the two boys, referred to repeatedly as "the rapists" in the complaint. The Plaintiffs claim Sheffield was unsympathetic to them in meetings and that they "started hearing comments in the community which appeared to be derogatory of H.S. and which purported to indicate detailed knowledge of the official investigation and grand jury proceedings." Pl. Amend. Compl. 24. A neighbor told C.S. that Sheffield had discussed the case with Bo Horka, an attorney, and his daughter. Horka's daughter confirmed to C.S. that in a conversation after the grand jury proceedings, Sheffield had discussed the case and appeared dismissive of H.S.' claim of rape.

When charges were no longer pending against them, the Rountree and Bolton were allowed to return to full participation. SISD decided not to impose further disciplinary measures. As a cheerleader, H.S. was required to cheer for all the players, including Bolton, when he joined the varsity basketball team shortly after returning to school. At a February game, H.S. cheered for the team but refused to cheer for Bolton himself when he was performing alone. She chose instead to sit on the bench while the rest cheered. Bain and Assistant Superintendent Lokey ("Lokey") pulled her aside during a break and told her she had to either cheer when the others cheered or go home to Silsbee. She chose to leave with her family. A few weeks later, before two scheduled post-season basketball games, McInnis gave H.S. a letter explaining that she was removed from the squad. C.S. confronted McInnis over the decision, appealed the

decision to Bain and ultimately to the SISD Board. As a result, H.S. was permitted to try out for the team again and she is now a member of the cheerleading squad again. Rountree is no longer a SISD student but Bolton remains enrolled.

The Plaintiffs first brought suit in this Court on May 8, 2009. On July 15, 2009, this Court ordered the Plaintiffs to file a first amended complaint on or by July 24, 2009, due to the insufficiencies of their original pleading under Rule 8(a) of the Federal Rules of Civil Procedure. The Court found that the original complaint failed to clearly and concisely state factual allegations that supported the elements of the asserted causes of action; further, to an overwhelming extent, it inappropriately included speculation, rumor and irrelevant matters. The Court allowed the Plaintiffs to refile in light of the gravity of the accusations and potential rights involved. The Plaintiffs' filed their First Amended Complaint on July 24, 2009. The Court notes that the new complaint is rife with the irrelevant and often snide remarks that characterized the original complaint. The Defendants in the case have filed motions to dismiss this new complaint for failing to state any claims upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Having reviewed the motions, the first amended complaint and all applicable law, the Court grants the Defendants' motions to dismiss in their entirety.

II. LEGAL STANDARDS

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of

the claim showing that the pleader is entitled to relief." To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, a Plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (quoting *Twombly*, 550 U.S. at 555-56) (internal quotation marks, citations and footnote omitted).

The court must accept "all well-pleaded facts as true" and must view them "in the light most favorable to the Plaintiff when considering a 12(b)(6) motion to dismiss. *Id.* (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). Rule 12(b)(6) does not permit dismissal of an action based upon a judge's disbelief in the veracity of the pleaded facts. *Neitzke v. Williams*, 490 U.S. 319, 327, (1989). Furthermore, the court accepts as true any reasonable inferences that may be drawn from the material allegations in the complaint. *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). At the same time, conclusory allegations and unwarranted factual inferences or legal conclusions are not accepted as true. *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007). In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Court noted that this pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 1949 (citing *Twombly*, at 555).

With these standards in mind, the Court now considers the substance of the Plaintiffs' first amended complaint and the Defendants' motions to dismiss.

III. ANALYSIS

The claims against District Attorney Sheffield are dismissed because his decisions regarding the indictment of Bolton and Rountree are within his prosecutorial discretion and his comments about H.S. did not deprive her of a recognized liberty interest. All claims against the Defendants SISD, Bain, Lokey and McInnis are dismissed because Plaintiff has failed to show that she engaged in protected First Amendment activity or was deprived of her right to due process or equal protection. Having dismissed all the Plaintiffs' federal claims, the Court shall not exercise supplemental jurisdiction over H.S.' assault and defamation claims against Bolton and Rountree.

A. The claims against District Attorney Sheffield are dismissed because his decisions regarding the indictment of Bolton and Rountree are within his prosecutorial discretion and his comments about H.S. did not deprive her of a recognized liberty interest.

1. District Attorney Sheffield is entitled to absolute prosecutorial immunity regarding his decisions to indict Rountree and Bolton before a mixed race grand jury and to call certain witnesses to testify and not other potential witnesses.

Appendix B

Sheffield's decisions to indict Rountree and Bolton at the time that he did and to call the witnesses he chose to call are all soundly within his prosecutorial discretion and as such are protected by his absolute prosecutorial immunity. *See United States v. Batchelder*, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.") (citations omitted); *see also, Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (holding that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983."). Plaintiffs have complained that Sheffield indicted Rountree and Bolton before a jury "so racially prejudiced that justice could not be expected or received." Pl. Amend. Compl. 23. They allege that Sheffield warned them "that the Grand Jury was racially divided and that the black Grand Jurors would not vote to return an indictment against Rountree and Bolton because of the race factor." However, at the same time he gave them the above warning, Sheffield also commented that the evidence was strong enough to meet the probable cause standard. *Id.* In essence, the Plaintiffs ask the Court to second guess a prosecutor's decision to indict where the evidence was sufficient and where the pending charges had a daily impact on two young men's lives because of offhand, and inappropriate, comments he made to them regarding the racial composition of the jury. Plaintiffs also impugn Sheffield's decisions on which witnesses to call before the grand jury. *Id.* ("While he put forward H.S. as a witness . . . he did not call Riley or any of the persons at the party. . . . Oddly, Sheffield did invite the Silsbee Police Chief to testify, even though he did

not participate in the investigation and was beholden to City Councilman Tyler."). The Court finds that all of the complained of decisions were a part of Sheffield's initiation and presentation of the State's case and therefore entitled to absolute immunity. The claims stemming from Sheffield's conduct in preparing for and during the grand jury proceeding are hereby dismissed with prejudice.

2. District Attorney Sheffield's comments did not deprive H.S. of her liberty interest in her good reputation.

While an individual has an interest in her good name and reputation, defamation by a state official, without other, additional deprivations of protected interests, is insufficient to establish a violation of the Fourteenth Amendment's due process clause. In *Paul v. Davis*, 424 U.S. 693 (1976), the Supreme Court held that a plaintiff's allegation that the police chief defamed him, by circulating a flyer on which his mug shot was displayed, was insufficient to invoke the protection of the Due Process Clause. *Id.* at 712. The Court noted that where its precedents allowed plaintiffs to vindicate damage to reputation under the Fourteenth Amendment, the damage was always intertwined with the loss of a right or status previously recognized by state law. *See id.*, at 710 (citing *Goss v. Lopez*, 419 U.S. 565 (1975) (where the Court, in holding that suspension from school based on charges of misconduct could trigger the procedural guarantees of the Due Process Clause, noted that such suspensions could seriously damage the student's reputation but relied upon the fact that Ohio law conferred a right upon all children

to attend school when it found that suspending a student without any process deprived the student of that right)). The Plaintiffs allege that Sheffield "falsely stigmatized H.S." Pl. Amend. Compl. 41. They allege that he did so in a press conference and in a social conversation. There is no allegation that Sheffield defamed H.S. while depriving her of any other recognized right or benefit under the law. Therefore, the Plaintiffs' complaint has not pleaded sufficient facts to pursue a § 1983 claim against Sheffield for deprivation of a recognized liberty interest under the Fourteenth Amendment's due process clause.

B. All claims against the Defendants SISD, Bain, Lokey and McInnis are hereby dismissed with prejudice.

1. H.S.' refusal to cheer was not protected speech.

H.S.' refusal to cheer with her team whenever Bolton performed on the basketball court was not symbolic speech. The Supreme Court has recognized that conduct, which is coupled with communicative intent, may raise First Amendment Concerns. *See Spence v. Washington*, 418 U.S. 405, 409 (1974) (finding protected speech where the appellant had [a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (finding students who wore black armbands in a school to protest the Vietnam war engaged in protected political speech). However, not all

conduct that is intended to convey a message to others is protected speech. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). To determine whether conduct "possesses sufficient communicative elements to bring the First Amendment into play, [the Court] must ask whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Canady v. Bossier Parish School Board*, 240 F.3d 437, 440 (5th Cir. 2001) (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410-11.). Here, the conduct at question is H.S.' public refusal to cheer for Bolton, although she cheered for the team as a whole. Pl. Amend. Compl. 30 ("She symbolically protested and expressed herself by either quietly folding her arms or going to sit by McInnis."). The message she desired to convey was "her disapproval of Bolton's and Rountree's behavior, Bolton's inclusion into a close setting with her [and] also to warn others of Bolton's dangerous propensities." *Id.* at 31. Her audience might correctly interpret her conduct as a slight to Bolton individually but the likelihood that they would understand her intent to convey his "dangerous propensities" seems low. Sitting down conveys disapproval, but not a basis for that disapproval and it is unlikely the audience would know what behavior H.S. was protesting. There is nothing in refusing to cheer that indicates one believes another is dangerous. Refusing to cheer might signal a host of problems between the cheerleader and the player from

petty to grave. H.S., therefore, did not convey the sort of particularized message that symbolic conduct must convey to be protected speech. Plaintiffs First Amendment claims are dismissed with prejudice.

2. H.S. was deprived of no protected property or liberty interests in violation of the Due Process Clause of the Fourteenth Amendment.

The Plaintiffs have not established any due process violations in their First Amended Complaint. The first step in establishing that one was entitled to due process is to establish that one was deprived of a legitimate property or liberty interest. Protected property interests are normally "created and their dimensions are defined" by an independent source such as state statutes or rules entitling the citizen to certain benefits. *See Goss v. Lopez*, 419 U.S. 565, 572-73 (1975) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Property interests generate from an individual's "legitimate claim of entitlement to a specific government benefit" and not an "abstract need or desire" or a "unilateral expectation." *Board of Regents*, 408 U.S. at 577. Texas courts, "like the overwhelming majority of jurisdictions" have consistently held that "students do not possess a constitutionally protected interest in their participation in extracurricular activities." *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Tex. 2005) (quoting *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 561 (Tex. 1985); *see also, In re University Interscholastic League*, 20 S.W.3d 690, 692 (Tex. 2000) (per curiam) (holding that the disqualification of a high school from participating

in a state baseball tournament did not violate player's constitutional rights); *Eanes Indep. Sch. Dist. v. Logue*, 712 S.W.2d 741, 741 (Tex. 1986) (holding that a dispute over who had won a high school baseball playoff series did not implicate constitutional due process rights). Therefore, H.S. did not have a protected property interest in cheering and the Court need not enquire into whether she had sufficient process when she was suspended. Given the absence of a protected interest, and noting that following her suspension she was reinstated after a formal appeals process, the Court finds that the Plaintiffs have failed to plead facts sufficient to support their claim that her suspension violated her 14th Amendment right to due process.

The Plaintiffs also allege that the decision to readmit Bolton and Rountree, after the grand jury refused to indict them, deprived H.S. of liberty interests by forcing her to go to school with them again. There is a constitutional obligation to afford a student process before suspending him from a public school. *Tinker v. Des Moines Ind't Comm. School Dist.*, 393 U.S. 503 (1969). There is not, however, a reverse form of constitutionally required process owed enrolled students who desire to prevent the readmittance of suspended students. The Court refuses to find that a student has a liberty interest in objecting to the enrollment of eligible students in her public high school. The school knew of her accusations, had responded to them at the time[1] and ultimately made the decision to

1. At the time the school decided not to pursue additional disciplinary actions against Rountree and Bolton, the two boys had already spent several months away from their high school in

readmit the boys after a police investigation and a grand jury proceeding had not resulted in prosecution. There are no facts to support a finding that the school, or its officials, owed her any additional process.

3. H.S. was not subject to any arbitrary or discriminatory treatment in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Plaintiffs' complaint alleges that the Defendants generally denied H.S.' the equal protection of policies and laws because of her gender and because of "her exercise of fundamental rights." Pl. Amend. Compl. 36. Plaintiffs' do not allege that the policies of the school were facially discriminatory, rather they allege that the named officials violated H.S.' right to equal protection in their application of school policy to her. *Id.* The Equal Protection Clause exists to ensure that every person within the state's jurisdiction is free from "intentional and arbitrary discrimination." *Sonier v. Quarterman*, 476 F.3d 349, 368 (5th Cir. 2007) "It is well established that a showing of discriminatory intent or purpose is required to establish a valid equal protection claim." *U.S. v. Crew*, 916 F.2d 980, 984 (5th Cir. 1990) (citing *Washington v. Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)). Plaintiffs' fail to allege any facts that support a finding of discriminatory intent, however, in the behavior

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a separate facility, during which period they were not allowed to participate in sports or other school activities.

of the school or its officials.[2] They offer no evidence that the school or its officials were motivated to act against her because of her sex or because she was a person who exercised her fundamental rights, instead Plaintiffs allege that the Defendants were motivated by a desire to have Bolton and Rountree playing on the school's sports teams. Pl. Amend. Compl. 29 ("SISD weighed its basketball program's and Bolton's interests against H.S.'s welfare . . . ."). Therefore, Plaintiffs' equal protection claims fail.

C. The Court shall not exercise supplemental jurisdiction over H.S.' assault and defamation claims against Bolton and Rountree.

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2. The complaint states that "Rountree and Bolton have been disparately favored by Defendants, vis a vis the treatment accorded H.S., tantamount to the denial to H.S. of equal protection." Pl. Amend. Compl. 36. They rest this claim on the fact Bolton and Rountree were not punished for their various alleged bad acts, from their attendance at the party where alcohol was served to "telling falsehoods to escape detection and obstruct justice." Pl. Amend. Compl. 35. The Plaintiffs include a litany of "reported" incidents where Bolton has escaped proper punishment. The facts plead do not show that Bolton or Rountree were favored by the school or school officials in any way. Bolton and Rountree were not allowed to be at their school for several months following the party and H.S.' accusations, they were not allowed to participate in their normal activities and they were publicly accused of a horrible crime. Yet the Plaintiffs continually present the case to the court as one where the school has heralded the accused as innocent while vilifying H.S. Under 12(b)(6), the Court adopts the facts plead in the light most favorable to the non-moving party. The Court does not, however, adopt the non-moving party's conclusory allegations as fact. Here, the facts plead do not support the vituperative theories of the Plaintiff.

Appendix B

Under 28 U.S.C. § 1367(c)(3), a district court "may decline to exercise supplemental jurisdiction . . . if [it] has dismissed all claims over which it has original jurisdiction . . . ." The Court has dismissed all of the Plaintiffs' federal claims and now declines to exercise supplemental jurisdiction over H.S.' assault claims against Defendants Bolton and Rountree. The claims against them are therefore dismissed.

CONCLUSION

The ability to sue for redress when constitutional rights are violated is an important and impressive aspect of the American constitutional system. *See* 42 U.S.C. § 1983. Attorneys may litigate such violations regardless of financial loss or gain in the struggle. *See* 42 U.S.C. § 1988. It is important that attorneys remember, however, that every situation where an individual feels, correctly or incorrectly, wronged will not amount to a deprivation of that person's constitutional rights. Plaintiffs believe their daughter was injured and treated unfairly by the various Defendants. Regardless of whether their belief is correct, they have not alleged any facts that support a finding she was denied her rights under the Constitution. The Court allowed them to file an amended complaint in light of the seriousness of their belief but the amended complaint has similarly failed to set forth claims for which relief may be granted and it has retained all of the failings of the original complaint by continuously referring to irrelevant matters and including unedited conjecture in place of factual allegations. Counsel for the Plaintiffs is reminded that the majesty of the law cited in a complaint does not

excuse an attorney from meeting the most basic pleading requirements. The Defendants' motions for dismissal are hereby **GRANTED**.

It is therefore **ORDERED** that the above case is **CLOSED.**

SIGNED this the 7 day of **October, 2009.**

/s/

Thad Heartfield
United States District Judge

APPENDIX C — ORDER DENYING PETITION FOR REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED NOVEMBER 22, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN DOE, Father of Minor Daughter H.S.; JANE DOE, Mother of Minor Daughter H.S.; H. S., Minor Daughter of John and Jane Doe,

Plaintiffs - Appellants

v.

SILSBEE INDEPENDENT SCHOOL DISTRICT; RICHARD BAIN, JR., Superintendent; GAYE LOKEY, Principal; SISSY MCINNIS; RAKHEEM BOLTON; DAVID SHEFFIELD,

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

ON PETITION FOR REHEARING EN BANC

(Opinion 09/16/10, 5 Cir., _____, _____, F.3d_____)

Before GARZA, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

Appendix C

(✓)Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]

United States Circuit Judge